

Nos. 11,320 and 11,321

United States
Circuit Court of Appeals
For the Ninth Circuit

POPE & TALBOT, INC., a corporation,
Appellant,
vs.

GUERNSEY-WESTBROOK COMPANY,
a corporation,
Appellee.

POPE & TALBOT, INC., a corporation,
Appellant,
vs.

BLANCHARD LUMBER COMPANY OF SEATTLE,
a corporation,
Appellee.

Appellant's Reply Brief

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RESTATEMENT OF ISSUES

There are two separate cases, one in admiralty and one at law, consolidated in these appeals. Some of the issues are identical for each case, others are involved in only one case. For these reasons it is believed that it would be helpful to the court to re-state the issues and outline the result of the possible decisions on each issue.

The issues as presented by the briefs are:

1. Whether the language of the acceptance of the sales order precludes retention of the freight money by appellant under the earned freight clause of the bill of lading. This issue is present only in the Guernsey-Westbrook action at law.

2. Whether the earned freight clause is optional or self-executing, and if optional, whether the option was exercised. This issue concerns both the Blanchard case and the Guernsey-Westbrook Case.*

3. Whether there was commercial frustration entitling appellant to abandon the voyage. This issue is involved in both cases.

If issues 1 and 2 only are decided by this court in favor of appellant, appellant will be entitled to retain \$937.25 representing freight on Guernsey-Westbrook Company's lumber destroyed at the time of the torpedoing and the judgment in favor of Guernsey-Westbrook should be reduced by that amount regardless of the decision on issue 3.

If issues 2 and 3 only are decided by this court in favor of appellant, the entire decree in favor of Blanchard Lumber Company should be reversed, regardless of the decision on issue 1.

If, of course, issues 1, 2 and 3 are decided by this court in favor of appellant, the judgment in both the Guernsey-Westbrook case and the decree in the Blanchard Lumber

*As appears later in this brief, we contend that as this question was first raised on this appeal by appellees' answering brief, it is not at issue in the appeals. It is listed in this statement for purposes of clarity.

Company case should be reversed, and appellant would accordingly be entitled to retain all the freight in both cases.

ARGUMENT

I.

APPELLANT IS NOT PRECLUDED BY THE TERMS OF THE GUERNSEY-WESTBROOK SALES CONTRACT FROM RELYING ON THE EARNED FREIGHT CLAUSE.

A—The provisions of the acceptances did not make delivery a condition precedent to payment of freight.

We are in accord with appellees' statement that under a c.i.f. sale where the freight rather than being paid directly by the buyer to the seller is deducted from the purchase price and the goods are shipped on "collect freight" basis, the buyer's liability for the freight is to the carrier and depends on whether the carrier under the contract of affreightment is entitled to the freight. Nor do we disagree with the principle that the seller may not arrange transportation on terms which are in violation of the buyer's instructions. But we do emphatically disagree with appellees' argument that under the terms of the contract of sale between Pope and Talbot, Inc., Lumber Division, as seller, and Guernsey-Westbrook, as buyer, the seller was precluded from arranging transportation on behalf of the buyer under a bill of lading which contained an earned freight clause.

The language on which appellees place such reliance must be examined in its factual setting. The Guernsey-Westbrook Company sent an order to appellant's Lumber

Division's New York sales office for a designated quantity and type of lumber at a stated price, c.i.f. Green St., Brooklyn, N. Y. The price included freight at \$16.00 per 1,000 board feet (Exhibit 4 to Pre-Trial Stipulation in Case No. 11320). In making the order, Guernsey-Westbrook either could have determined to pay the full purchase price including freight on receipt of shipping documents, leaving to the seller the obligation to arrange for and to prepay the freight, or it could have requested an allowance of the freight charges from the seller's invoice price, in which event the seller would arrange for transportation for buyer's account on customary "collect freight" bills of lading. It chose the latter method, stating, "Terms: After deducting ocean freight, sight draft for 98% attached invoice * * * etc."

The sales contract was completed by the "acceptance of order" prepared by appellant's Lumber Division's New York Office. It too lists the quantity, type and size of the lumber, and designates a price c.i.f. Brooklyn which included the freight. In keeping with the buyer's choice of one of the two methods of payment of the price under a c.i.f. sale, the seller merely identified the method by which the total purchase price was to be paid by the language:

"Terms: ocean freight net cash on arrival of steamer; Balance 98% sight draft with documents attached, including negotiable bill of lading to order of Marine Midland Trust Co."

The seller in using the above language was not thinking about nor concerned with delivery or arrival of the goods or the details of carriage. It was thinking about how the total price was to be divided up and paid in accordance

with the order. In using the words "ocean freight net cash on arrival of steamer" it meant the ocean freight will be deducted from the invoice price and the goods will be shipped on a steamer under a usual bill of lading on collect freight terms for buyer's account. The seller was not making arrival of the steamer a condition to the buyer's paying the freight; it was only interested in designating *the type of sales transaction*. A buyer in reading the provision would so interpret it.

In our opening brief (pp. 12 to 18) we cited and discussed a number of cases which illustrate that in sales contracts where a place of delivery is mentioned in conjunction with terms of price, the reference is to the amount of or manner of paying the price and does not make delivery a condition to performance. Appellees' brief (pp. 24-33) rejects these authorities on the grounds that the facts are dissimilar to the case under discussion. While the cases cited are not factually on all fours with this case, they nevertheless serve to demonstrate what it is that parties to a sales contract, such as that under consideration, have in mind in referring to place of delivery in connection with price terms.

Appellees properly point out that the acceptance was prepared by the appellant. Is it reasonable to presume that a seller would voluntarily prepare an acceptance of an order in such a way as to compel himself to require a carrier to omit a standard clause of its bill of lading thus making it difficult for the seller to arrange transportation or, if he contemplates shipping by his own vessel, to require himself to omit a standard clause of his own bill of lading? The mere statement of the proposition demonstrates that the acceptance was the completion of

the sales contract and not part of a contract of affreightment, and the language used was sales contract language.

If the torpedoing had not occurred but for some reason the lumber had been transferred to railroad cars for the last part of the transportation and the steamer did not put in to Brooklyn, we seriously doubt if Guernsey-Westbrook Company would claim that it was not required to pay the freight, and yet under their literal interpretation of the provision, as there would be no "arrival of steamer at destination," the so-called condition for payment would not have been met. This example serves to illustrate that the language was not intended to make arrival of steamer a condition to payment of freight but merely to designate that the freight portion of the invoice price would be taken care of by a "freight collect" shipment.

B—The provisions of the Acceptance did not constitute a direction to eliminate the earned freight clause.

The seller, under a c.i.f. contract of sale in which the freight charges are allowed on the designated purchase price has the duty of arranging transportation for the account of the buyer under usual and customary terms. Since in such a sale the seller is relieved of any obligation to pay the freight charges, he normally arranges transportation as agent for the buyer under "collect freight" bills of lading. It is manifest that the seller is authorized to accept for the buyer the customary terms of the carrier's bill of lading.

There is nothing novel about the use of an earned freight clause by an ocean carrier. Nor is there any novelty about such a clause as applied to "collect freight" shipments. An earned freight clause was upheld by the

Ninth Circuit Court of Appeals in a collect freight shipment as far back as 1904. *Portland Flour Mills Company v. British & F. M. Insurance Company*, 130 Fed. 860. Nor has the use of earned freight clauses of all varieties and in all types of shipments diminished. The universal adoption of earned freight clauses was recognized by this Court in

Mitsubishi Shoji Kaisha v. Societe Purfino Maritime 133 F. (2d) 552,

in stating, p. 558:

“For over a quarter of a century the majority, if not all, of the larger Steamship Companies have had similar clauses in the hundreds of thousands of bills of lading issued for the ocean carriage of merchandise. They are accepted as normal incidents of sea borne commerce and are one of the factors in determining ocean freights.”

Appellees assert that the words “ocean freight net cash on arrival of steamer” in the seller’s acceptance to the buyer’s order constitute a direction precluding the use of an earned freight clause in transportation arranged by the seller for the buyer’s account. While we do not contend that the seller under such a c.i.f. sale would be permitted to obtain transportation on behalf of the buyer under a bill of lading which contained an earned freight clause if the buyer specifically instructed the seller to require the carrier to omit such a clause, we do maintain that in view of the widespread use of earned freight clauses the direction must be clear and explicit and leave no doubt that such is its purpose.

The provision relied on by Guernsey-Westbrook Company in the sales acceptance does not meet the require-

ments of a direction precluding an earned freight clause. First, as shown above, the provision is not intended to and does not constitute a direction as to terms of transportation but appears in a sales contract and refers to the manner in which the total purchase price, which included freight, was to be taken care of by the buyer.

Second, both the District Court and appellees maintain that the provision is ambiguous (appellees' brief p. 7). An ambiguous clause should not be held to be a direction to a seller to refrain from arranging transportation under standard accepted terms.

Third, at the most the provision "ocean freight net cash on arrival of steamer" is but a direction to arrange transportation on "collect freight" basis. There is nothing inconsistent about "collect freight" and an earned freight clause, as is shown by cases discussed by appellees which uphold such clauses in collect freight shipments. Under normal conditions of transportation freight is collected "on arrival of steamer at destination". The earned freight clause takes care of the abnormal situation when the voyage is frustrated. An instruction to ship "collect" is not an instruction prohibiting the use of an earned freight clause.

Fourth, the language which is said to constitute an instruction precluding the seller from shipping under a bill of lading containing an earned freight clause is the seller's own language. A seller will not give itself odious instructions. Common sense shows that a seller shipping on another's vessel, as could have been done under the sales contract in the instant case, would not voluntarily and unnecessarily take upon himself the task of requiring the carrier to alter its customary bill of lading. *A fortiori*

a seller who contemplates shipping by its own conveyance would not by its own voluntary act force itself to alter or eliminate favorable provisions of its own bill of lading.

C—No inference of intent to eliminate the earned freight clause can be drawn from Appellant's insurance program.

Guernsey-Westbrook contends (Appellees' Brief, p. 20) that in the absence of any explanation, the fact that Pope and Talbot, Inc. procured insurance to cover freight on the SS Absaroka raises an inference that it believed it would not be entitled to freight if the goods did not reach their destination. It should be remembered that the contracts and shipments involved in these appeals were made in the beginning of the war with Japan. On the morning of Pearl Harbor, Mr. Lunny, Vice President of Pope and Talbot, Inc., from his home arranged for complete war risk blanketing the entire operations of the company (T. 107). In addition, the company had an open policy of marine insurance covering its operations, including freight (T. 19). Appellees' shipments on the SS Absaroka were but a small portion of the whole shipload, the bulk of which was owned by appellant (T. 132). It is obvious that appellant, in arranging insurance on its operations as a whole and obtaining coverage accordingly, was not in those hectic days considering each minor transaction separately. It is not reasonable to presume that appellant considered for a moment appellees' strained construction of the language of the acceptance and thereby determined to obtain insurance coverage for the freight on the shipments. The inference which appellees seek to draw is unfounded.

D—The T. K. K. Case is not in point.

Counsel for Guernsey-Westbrook Company, as did the District Court, contend that the decision of the Ninth Circuit Court of Appeals in *Toyo Kisen Kaisha v. W. R. Grace & Co.* 53 F. (2d) 740, is controlling authority that the provision in the acceptances, "Terms: ocean freight net cash on arrival of steamer", required delivery at destination as an absolute condition to payment of freight and negatived the earned freight clause of the bill of lading. The T. K. K. case is distinguishable in two important respects.

The first distinction is that the contract which was held to eliminate the earned freight clause of the bill of lading in the T. K. K. case was a contract of affreightment between shipper and the carrier and involved neither as seller or buyer. Its sole purpose was to set out the terms of the affreightment, whereas in the case at bar the language of the acceptance which it is contended controls and eliminates the earned freight clause of the bill of lading is in a sales contract between seller and buyer. Its purpose is to set forth the terms of the sale and the purpose of the quoted language is to show how the freight charges, which were part of the purchase price, were to be handled. In answer to this distinction, appellees say the provision "restricts the terms on which the seller *as carrier* may charge freight." While we hesitate to further discuss a case which has been considered at length by both parties and is familiar to this court, we feel it may be helpful to point out in more detail the differences between the contract in the T. K. K. case and the acceptances on which appellees rely. Examination of

the confirming letter in the T. K. K. case from the shipper to the carrier proves conclusively that it is concerned solely with the problem of transportation. There is no mention of any sale or price.

The first paragraph makes reference to a prior telephone conversation. The second paragraph describes the total tons to be shipped, names the vessel to perform the carriage and the freight rate. The third paragraph consists solely of the provision, "Freight payable in San Francisco on receipt of weights in Honolulu." The fourth paragraph determines the manner of loading, the rate or speed of discharge and names the wharfs where cargo is to be discharged. The fifth paragraph refers to the cost of the weighing necessary to determine amount of freight charges. The sixth paragraph asks for confirmation. The letter details the terms of transportation only. Contrast this letter to the acceptance which, contrary to the implication of appellees' brief (pp. 6, 16), does not even name the vessel or the carrier and gives no details of transportation other than as directly related to the sales price. Not only is the acceptance completely lacking in any details of the transportation but, opposite to the contract in the T. K. K. case, contains every detail regarding the sale and the quantity, type, price and terms of sale. It is submitted that a comparison of the documents adequately proves the distinction.

The second major distinction between the cases is that the bill of lading in the T. K. K. case specifically referred to the prior agreement by marginal notation stating "Freight as agreed" and "Freight as per agreement," thus disclosing a clear intent to abide by the terms of

the prior contract of affreightment. No reference to the acceptance on which appellees rely appear in the margin or any place in the bill of lading covering appellees' shipments, for the obvious reason that the sales contract was no part of the affreightment contract. Appellees' answer to this distinction is that the bills of lading in the T. K. K. case "contemplated marginal notations." We fail to see the significance of such fact, if it is a fact.

II.

THE EARNED FREIGHT CLAUSE WAS NOT OPTIONAL BUT SELF-EXECUTING.

A—Appellees may not now raise the issue.

In our opening brief we did not discuss the contention raised in the trial court by the appellees that for appellant to take advantage of the earned freight clause it was required to exercise an option which it failed to do, for the reason that the District Court correctly decided the issue in favor of appellant. The issue was not presented by the Assignment of Errors in the admiralty case nor by the Statement of Points upon which appellant intends to rely on appeal in the law case. Appellees did not file cross-appeals or counter designation of points in either case. It is our contention that appellee has waived any right to raise the issue.

Appellees cite (their brief, p. 4) *The John Twohy*, 255 U.S. 77, to the effect that upon an appeal by a party to an admiralty suit the non-appealing party may challenge the judgment in so far as it is adverse to him. The decision is limited to an admiralty appeal. Its basis is that in admiralty an appeal is a trial *de novo*.

Under the authority of this decision it is probable that Appellee Blanchard Lumber Company would not be required to file a cross-appeal to raise the option question in the admiralty action. However, under Rule 19, Subdivision 6 of the rules of this Honorable Court, Appellee Blanchard Lumber Company, on being served with appellant's Assignment of Errors and Statement of Points which adopted the Assignment of Errors, and noting that such Assignment of Errors referred only to the question of abandonment, was required to file within ten days a counter-designation of additional points or parts of the record and failure to do so constituted a consent to a hearing only on the single issue raised by appellant, namely, frustration.

In the Guernsey-Westbrook action at law, in addition to requiring a counter-Designation of Points under Rule 19, Subdivision 6, referred to above, the authorities definitely require that appellee file a cross-appeal "either to enlarge his rights under the judgment appealed from or to lessen the rights of his adversary."

Arkansas Fuel Oil Company v. Leist, 133 F. (2d) 79 (CCA 5);

Morley Construction Co. v. Maryland, 300 U.S. 185, 81 L. Ed. 593;

U. S. v. Johnson, 93 F. (2d) 462 (CCA 8);

Ency. of Federal Procedure, Vol. X, Sec. 5172;

O'Brien's Manual of Federal Appellate Procedure, 3rd Ed., p. 53;

Moore's Federal Practice, Volume III, p. 3576.

Having failed to file a cross-appeal on the part of the judgment decided adversely to appellees, they may not

by reply brief in Pope and Talbot's appeal, raise the question.

B—The decision of the District Court rejecting appellees' contention that the earned freight clause was optional is correct.

While under the above authorities appellees may not now raise the question as to whether the earned freight clause is optional and whether, if so, the option had been properly exercised, as appellees' brief discussed the question at length we desire to answer the argument and to point out that the District Court's decision in this respect was proper. The paragraph containing the earned freight provision is as follows:

3. "*Full freight to destination on weight or measurement at Carrier's option at declared rates (unless otherwise agreed) and all advance charges against the goods are due and payable to the Carrier at its option upon receipt of the goods by the latter; and the same and any further sums becoming payable to the Carrier hereunder and extra compensation, demurrage, forwarding charges, general average claims, and any payments made and liability incurred by the Carrier in respect of the Goods (not required hereunder to be borne by the Carrier) shall be deemed fully earned and due and payable to the Carrier at any stage, before or after loading of the service hereunder, without deduction (if unpaid) or refund in whole or in part (if paid) Goods or Vessel lost or not lost, * * *.*" (Emphasis supplied).

It is manifest that the first option in the paragraph refers to the carrier's right to determine freight on the basis of either weight or measurement. It has no relation to the subsequent earned freight provision. The second

option gives the carrier the privilege of determining whether the freight shall be collected by it "upon receipt of the goods". This option in effect gives the carrier the right to designate in the space appearing therefor on the face of the bill of lading the words "prepaid". The shipments in question were on the collect basis and the framed space on the face of the bill of lading so designated. This option does not extend to or refer to the earned freight clause which begins at the semicolon. The earned freight clause is the agreement that the freight "shall be deemed fully earned and due and payable to the carrier at any stage, etc." The words "and the same" preceding the foregoing quotation refer to "Full freight to destination." The carrier to thus take advantage of the earned freight clause was not required to exercise any option. The District Court ably discussed the point and decided that the earned freight clause is self-executing, in the following language (T. 40-41):

"The first option obviously refers to 'weight or measurement'; the second refers to the right of the carrier to declare freight due and payable upon receipt of the goods. The latter option, as defendant states, was not exercised. The remainder of the clause, appearing after the semi-colon, necessarily relates to the carrier's right to freight 'goods or vessel lost or not lost'. The words 'and the same' at the beginning of the second portion of the clause, can logically only relate to 'full freight to destination' and not, as contended by plaintiffs, to 'the freight which has become due and payable through the exercise of defendant's option.' The latter portion of the clause can only be intended to provide for the contingency of defendant's inability to deliver the goods, whether advance freight and charges have or have not been

paid. Otherwise the words 'without deduction (if unpaid) or refund in whole or in part if paid' would be meaningless. It will also be noted that while the first section of the clause relates to freight and advance charges payable upon receipt of the goods by the carrier, at its option, the second portion relates to freight and to 'further sums' which in their nature would become due after receipt of the goods, whether or not the option had been exercised, indicating that the exercise or non-exercise of the option would have no bearing on the effectiveness of the latter portion of the clause. In the lower righthand corner on the face of the bill of lading is a 'framed' space where freight may be designated either as 'total collect' or 'total prepaid'. It would be unreasonable and forced construction of the clause to find that defendant intended to secure its freight charges, in case of its inability to deliver the cargo, only if the same had been prepaid. *I conclude that the earned freight clause is self-executing and that no option was required to be exercised to make it effective.*" (Emphasis supplied.)

Appellees not only contend that the earned freight clause is dependent on an option which, as pointed out does not in fact exist, but further contend that the supposed option has a time limit; that it must have been exercised, if the carrier was to have taken advantage of the earned freight clause, "before the vessel was torpedoed" (Their Brief, p. 5).

We are unable to discern from what language or what provision this time element is derived nor do appellees furnish any help in indicating its source. If paragraph 3 of the bill of lading were to be construed as requiring the carrier to exercise an option to make the earned freight

clause effective, it is submitted that such an option could be exercised at any time and in any manner. A declaration of intent to retain the freight money from the sale of the proceeds would suffice.

Not only does the language of paragraph 3 demonstrate that the earned freight clause of paragraph 3 is self executing but a consideration of the practical aspects of the clause compels the same conclusion. We can conceive of no reason why a carrier, in preparing a bill of lading, would require itself to exercise an option to make effective a clause which is written entirely for its benefit. Under what circumstances would the carrier not desire to have the earned freight clause effective?

Appellees endeavor to make some point of the assertion that the earned freight clause in Pope and Talbot, Inc.'s bill of lading is not "typical" as judged by clauses appearing in the decided cases (brief p. 45). But the point, if it is a point, is answered in their brief where they state (p. 47) "—although earned freight clauses have wide currency there is a great variation in terms, and the interpretation of each such clause must depend on its own peculiar wording." Appellees further assert that earned freight clauses applied to collect freight are not so common as those applied to prepaid freight and conclude that there must be a clear showing that they are to be applied to collect freight before such application will be upheld. The basis of the assertion that such clauses "are by no means so common" as applied to collect freight is the comparison of the number of cases decided and discussed by the authorities dealing with both types of affreightment. We submit that the amount of litigation in which earned freight clauses as applied to collect freight are

considered has no bearing on the number of steamship companies adopting earned freight clauses applicable to collect freight or the frequency of their use. Furthermore, appellees' conclusion that the earned freight clause to apply to collect freight must specify "this clause is applicable to collect and prepaid shipments" or equivalent language is unfounded as demonstrated by the decision of this Court in *Portland Flour Mills Co. v. British & F. M. Ins. Co.* (CCA 9) 130 Fed. 860. The earned freight clause read:

"The several freight and primages to be considered as earned, steamer or goods lost or not lost, at any stage of the entire transit."

The clause makes no reference to either "earned" or "collect" freight, although in fact the freight under the bill of lading in that case was "collect". The court said, "In the present case the intention of the parties was clearly expressed in the bill of lading. There was nothing of an equivocal or ambiguous character contained therein and there were no words used which required any oral testimony as to their true meaning."

We submit that the earned freight clause in paragraph 3 of the bill of lading issued for appellees' lumber is not ambiguous, and is self-executing and the District Court correctly decided the issue.

III.

THE ABANDONMENT WAS JUSTIFIED

Due to the complexity of the first issue discussed in this brief, we have devoted considerably more space to it than to the issue of abandonment. However, we consider the question of abandonment the primary issue and accordingly desire to emphasize that the brevity of our discussion relative thereto is not commensurate with the magnitude of its importance.

There is no disagreement between the parties to this appeal with respect to the legal principles under which a carrier is entitled to declare that a voyage has been commercially frustrated and thereby collect or retain freight under an earned freight clause. The principal difference of opinion is with respect to the facts confronting appellant in abandoning the voyage and in the interpretation of the testimony relative to such facts.

The point which appellees most stress and which was relied upon by the District Court is that Mr. Lunny, Vice President of Pope & Talbot, Inc., who made the decision to abandon, in his testimony emphasized delay in making repairs as a reason for abandonment. Appellees derive therefrom the conclusion that other factors which Mr. Lunny testified existed at the time of the decision to abandon can not be considered as grounds for abandonment. The decision which this court must make as to whether the abandonment was justified is not limited to what was most emphasized in the testimony but must be determined on the basis of all the factors existing and considered by appellant regardless of the comparative weight subsequently attributed by appellant to particular factors.

It is not our purpose again to repeat and discuss at length all of the factors justifying the abandonment, but merely to comment briefly on some of the points raised by the appellees. Appellees point out that, at the time of the decision to abandon, the vessel was not in fact requisitioned and that appellant did not know for certain that it would be requisitioned or otherwise required by the government. Actual governmental interference is not required; anticipated governmental interference is equally a ground for abandonment. The government did not customarily forewarn ship operators that their ships were to be requisitioned. Appellant testified that it "felt reasonably certain" the vessel would be required by the government. (T. 100) Its expectations were justified by the fact that the vessel was actually requisitioned by wire of April 14, 1942 from the War Shipping Administration.

Appellees hazard the conjecture that if the Absaroka had not been free of commitments the government "might have postponed the effective date of its action to permit the ship when repaired to complete its pre-existing contracts." There is nothing to indicate that the government, in sending the wire, was aware of the abandonment of the voyage. Our conjecture is that the government neither knew nor cared whether the vessel was free of commitments. The Absaroka was especially adapted to the carrying of long pile, which was "just what Pearl Harbor needed." (T. 104) Such needs were more important than the completion of private commercial ventures.

We agree that to constitute a ground for abandonment, the danger from submarine activities would have to be substantially greater when the decision to abandon was

made than when the vessel sailed. But that condition was fully met. The essential consideration is not the mere possibility of submarine activities but their actual extent. Appellees point out that Pope & Talbot, Inc. was aware that there was a submarine campaign in the Atlantic against the English and the French before we entered the war, and that while the "presence of Japanese submarines so close to our West Coast so shortly after the attack on Pearl Harbor came as somewhat of a shock," nevertheless coastal submarine activity was not unforeseeable. Appellees further assert Mr. Lunny testified that there was a torpedo boat campaign in the Caribbean against the English and the French before we were in the war. His testimony, when queried directly on this question, was, "I don't know about the Caribbean before the war." (T. 106) The testimony with respect to the submarine campaign in the Atlantic before our entry into the war was with respect to English and French ships not in the waters along the Atlantic *coast* of the United States but in the *Atlantic*; obviously of primary concern to a trans-Atlantic voyage and comparatively remote to an American ship operator contemplating an intercoastal voyage which would extend only in part along our Atlantic seaboard.

While it was admittedly not beyond the realm of possibility when these bills of lading were issued that German submarines would move against American shipping on the Atlantic seaboard and in the Caribbean, and even that Japanese submarines would bridge over 7,000 miles of ocean to our Pacific coast, *the point is none of these events had taken place*. Prior to December 20, which is

two days after the Absaroka sailed, there was no evidence of Japanese submarines on the Pacific coast. (T. 26, 100) The first American vessel sunk in the Caribbean was appellant's West Ivis which sinking occurred after the Absaroka's torpedoing and before the decision to abandon. (T. 106) It is common knowledge that the intensive German submarine campaign off the Florida coast and along our Atlantic seaboard was subsequent to 1941. By contrast to the conditions thus existing at time of sailing, the testimony shows that *at the time of the decision to abandon* there was a real existing submarine menace "on the whole Pacific Coast, and on the whole Atlantic Coast," as evidenced by actual sinkings, "but the Caribbean was the worst * * * there were too many sinkings especially in that territory between the Panama Canal and the North Atlantic." (T. 101) Nor could anyone, with the possible exception of top Navy officers concerned, predict any improvement in the situation. Furthermore, it must be remembered that when the decision to abandon was made the Absaroka was undergoing repairs from an actual enemy submarine attack from which she was miraculously saved, and appellant had just lost another of its vessels by torpedoing. Considering these facts, it would be entirely unrealistic to say that this was not a hazard substantially greater than that resulting from the mere possibility of submarine attack, as the situation reasonably appeared at the time of sailing.

Again unrealistically, appellees have attempted to distinguish the cases which we cited in our opening brief by saying that these involved vessels which "turned back while on the high seas because of the apprehension of

seizure or destruction.” Appellees emphasize the point by repeating “These vessels were on the high seas” and by contrast, stating “Here we have the Absaroka, an American vessel, undergoing repairs in an American port.” The argument loses sight of the reason for the repairs. A vessel which has been torpedoed and almost sunk would appear as justified in not venturing forth into waters known to be infested by submarines as vessels which have not been attacked but which turned back because of the apprehension of such an attack.

We have not found a decision nor have appellees cited any cases which contain in one set of facts a combination of circumstances justifying the abandonment of a voyage approximating those which confronted appellant, although the reports are replete with cases in which the court considered the abandonment justified under less compelling circumstances. We submit that the abandonment of the voyage was entirely justified.

CONCLUSION

The decision of the District Court that the language of the acceptance in the Guernsey-Westbrook sales agreement precludes appellant from relying on its earned freight clause and that the abandonment of the voyage is not justified is in error. Its decision that the earned freight clause is self-executing can not be questioned by appellees in these appeals but in any event it is proper. It is accordingly respectfully requested that the decree in Case

No. 11321 and the judgment in Case No. 11320 be reversed to permit appellant to retain the freight to which it is entitled.

Respectfully submitted,

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